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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1963

No. 218

JOHN CARDILLO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1962

No. .....

John Cardillo,

Petitioner,

—against—

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

John Cardillo, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, made and entered the 24th day of April, 1963, affirming a judgment of conviction of petitioner in the United States District Court for the Southern District of New York (Thomas F. Murphy, Judge, sitting without a Jury).

Opinion Below

The opinion of the United States Court of Appeals which affirmed the judgment of conviction of petitioner, is not yet officially reported, —— F. 2d ——, September Term, 1961, No. 365, opinion pages 3397 to 3415 inclusive. A copy of said opinion accompanies this petition in the Appendix annexed hereto.

Petitioner John Cardillo, *et al.*, appealed from judgments of conviction for violation of 18 U. S. C. §§2, 371, 2314, 2315, through the interstate transportation of stolen furs, the interstate receipt of stolen furs, and conspiracy to do the same.

Petitioner appealed from the judgment of conviction and sentence of five (5) years imprisonment imposed upon him on November 3, 1961, after he was found guilty of counts 3 and 4 under indictment No. 60 Cr. 988, on September 28, 1961. Petitioner is currently at liberty on bail pursuant to the issuance of a stay of the mandate. Petitioner requested and obtained an order extending the time to file his petition for a writ of certiorari to and including June 22, 1963; which order was issued by Associate Justice John M. Harlan, of the Supreme Court of the United States.

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit, which is sought to be reviewed herein was made and entered April 24, 1963. This latter judgment affirmed the judgment of conviction in the United States District Court for the Southern District of New York, which adjudged petitioner herein guilty on counts 3 and 4 and concurrent five year sentences were imposed upon petitioner.

The jurisdiction of this Court is respectfully invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C., §1254(1) on the ground that review by the Supreme Court of the United States by writ of certiorari is sought on a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

Certiorari is sought on the grounds that the United States Court of Appeals for the Second Circuit: a) has

rendered a decision on an important question of Federal Law in conflict with applicable decisions and controlling case law; b) has decided an important question of Federal Law which should be clarified and made more definite and certain by this Court; c) has decided said question in a way probably not in accord with the applicable decisions of this Court and with other Circuits; d) and/or because of the importance of the question for the administration of criminal justice in the Federal Courts. The records of proceedings before the United States Court of Appeals and the United States District Court have each been certified and forwarded to the United States Supreme Court.

Questions Presented for Review

1) Whether it was prejudicial error for the Trial Court to rule that petitioner was not entitled to receive certain statements.

2) Whether petitioner was deprived of due process of law by reason of the improper limitation of cross-examination of government's principal witness.

Concise Statement of Case

This case arose out of the alleged burglary of a fur shop in Paterson, New Jersey, on September 18, 1960. This appellant was not involved in any way in the alleged burglary and was not charged in the first and second counts of the indictment, which concern the alleged transportation of the stolen furs by three of the defendants from Paterson, New Jersey, to New York City.

The essence of the government's case against Cardillo (and against several other defendants) came from the lips of a co-defendant, Thaddeus Ohrynowicz, who had pleaded

guilty to all four counts of the indictment before Judge Murphy approximately three months before the trial of appellant and the other defendants. Judge Murphy had then sentenced Ohrynowicz to consecutive prison terms totaling ten years after his counsel had said he " * * * was willing and ready to admit his own guilt but was not desirous of involving anyone else * * *" (R. 1828).*

According to the testimony of Ohrynowicz, he and two other defendants, Louis Piselli and John Knapp, burglarized a fur store in Paterson, New Jersey, and separated following the burglary due to an unforeseen interruption of their crime, after having removed some furs from the store. Ohrynowicz left the scene alone, he said, and without any furs in his possession. He returned to New York City on the same day, September 18, 1960.

In New York City, Ohrynowicz testified, he saw the appellant, Cardillo, standing in front of a bar and told him, "We just got a rumble on a store in Jersey, a fur store, it was a considerable number of furs involved and I don't know what happened to the other guys who were with me" (R. 505). There was nothing said by Cardillo about this, and he said that he had not seen two men whom Ohrynowicz asked about. They talked about things in general for a few minutes. Then Ohrynowicz said, John Knapp arrived and spoke to him; Knapp explained how he and Piselli split up after the burglary and he, Knapp, had driven to New York alone with a bag and suitcase of furs (R. 506).

Then Ohrynowicz testified, he asked appellant, Cardillo, to use his car and remove the bags from the checkroom where they were then located (R. 507). Cardillo assented and rode in the car with Knapp and Ohrynowicz to the Port Authority Bus Terminal where Knapp picked up the bag and suitcase and brought them to the car, accord-

* R. refers to the original Trial Record on Appeal.

ing to Ohrynowicz (*ibid.*). Ohrynowicz said he then put the furs in his hotel room at the Henry Hudson Hotel and left them there (R. 508).

All of this testimony implicating Cardillo was contradicted by a statement Ohrynowicz gave to two agents of the F.B.I. on October 19, 1960 (Defendant's Exhibit J, App. 3a).* Oddly enough, Ohrynowicz swore on cross-examination that he had told the F.B.I. agents the truth in giving that statement (R. 581). This statement, discussed more fully below, says in substance that Ohrynowicz met Knapp in New York City on September 18th following the burglary and the two of them took the furs to Ohrynowicz's hotel. There is no mention of any participation by Cardillo or even any suggestion that he was present.

Subsequently, on September 19, 1960, Ohrynowicz testified, Cardillo came to a hotel room with one Paul Kramer, who examined the furs that were there and discussed prices with Ohrynowicz (R. 516, 530, 531). Other defendants, one of whom was acquitted by Judge Murphy, were present in that room. Ohrynowicz also testified that some time after the furs were sold by another defendant, by virtue of the efforts of other convicted defendants and without any participation of Cardillo, he gave Cardillo $150 (R. 533).

Paul Kramer testified that he was a manufacturer of fur-trimmed sweaters, who had met Cardillo when this appellant purchased a sweater from him (R. 717-719). Kramer said that some time in the middle of September, 1960, Cardillo had asked him to appraise some merchandise and that he accompanied him to a hotel room in the George Washington Hotel, where he saw Messrs. Donohue (who was acquitted at trial) and Ohrynowicz, and examined some

* Refers to page of Appendix of Petitioner in Court below.

furs (R. 722-724). After setting a figure as the value of these furs and some discussion about price with Ohrynowicz, Kramer left the hotel (R. 725). Kramer testified that he had two subsequent telephone conversations with Cardillo concerning his possible purchase of the furs. In the first conversation, he indicated some interest in the furs, but on the following day, he said, he rejected the notion of purchasing them (R. 725).

That comprised the prosecution's case against Cardillo, who was not involved in any way in any of the other dealings or transactions in this case.

Reasons Relied on for the Granting of the Writ of Certiorari

ARGUMENT

POINT I

Petitioner was deprived of a fair trial by reason of the improper restriction of the cross-examination of the principal prosecution witness.

There was serious, prejudicial error committed by the trial judge in restricting cross-examination of the principal prosecution witness. This error occurred both when the trial court erroneously instructed the witness, Ohrynowicz, concerning the scope of his privilege against self-incrimination and when he sustained objections to defense counsel's questions.

The cross-examination of the witness, Ohrynowicz, was particularly crucial to Cardillo's case because Ohrynowicz was the only witness who implicated this petitioner with testimony that might have been sufficient to warrant a conviction in this case.

At the outset of the cross-examination of Ohrynowicz, he admitted that he was arrested on October 1, 1960. Then, when he was asked whether he was fleeing from another burglary at that time, the trial judge volunteered this advice to him, "If this is a crime that they are talking about that you have not been convicted of, you have a constitutional right to refuse to answer any question that might tend to incriminate you on that charge". (R. 561). Petitioner's counsel pointed out to the trial court that he was entitled to explore other charges pending against Ohrynowicz and other criminal activity on his part in order to show a possible motive for falsification of his testimony (R. 563). It was repeatedly argued by petitioner's counsel that a witness in the federal court has no right to decline to answer a question on the basis of the Fifth Amendment to the United States Constitution where it is incrimination under state law that is feared (R. 565, 567). Nevertheless, the trial judge adhered to his erroneous interpretation of the Fifth Amendment and the witness, Ohrynowicz, curtailed the cross-examination by seeking refuge behind the shield improperly extended to him.

Over thirty years ago, the United States Supreme Court held that a witness is not entitled to rely on the privilege against self-incrimination extended by the Fifth Amendment simply because he fears prosecution for state crimes when he is being investigated by Federal authorities. *U. S.* v. *Murdock*, 284 U. S. 141, 149 (1931); cf. *Kiewel* v. *U. S.*, 204 F. 2d 1 (8th Cir. 1953). Recently the Supreme Court reaffirmed the rule that while the Fifth Amendment is a safeguard against the power of the federal government to compel self-incriminating testimony, it is no bar to an inquiry into state offenses. *Knapp* v. *Schweitzer*, 357 U. S. 371, 380 (1958).

It is always competent to cross-examine a witness to explore his bias or motive for testifying falsely. Even though the general scope of cross-examination is committed to the sound discretion of the trial court, if the trial judge completely cuts off a line of cross-examination which the defense is entitled to pursue, reversal must result. *Alford* v. *United States*, 282 U. S. 687 (1931).

In the *Alford* case, the Supreme Court reversed a conviction on the sole ground that the trial court had improperly curtailed cross-examination of a principal prosecution witness by refusing to let defense counsel ask where he resided. 282 U. S. 687, 693.

It made no difference, the Supreme Court held, that defense counsel had been informed that the witness was then in custody, because cross-examination is not merely a device to expand the knowledge of defense counsel, but serves to put information about the witness before the trier of fact. The Supreme Court said, concerning this vital right,

> "It is the essence of a fair trial that reasonable latitude be given the cross examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. *Tia-Koo-Yel-Lee* v. *United States*, *supra*; *King* v. *United States*, *supra*; *People* v. *Moore*, 96 App. Div. 56, affirmed without opinion, 181 N. Y. 524; cf. *People* v. *Becker*, 210 N. Y. 274. To say that prejudice can be established only by showing that cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a sub-

> stantial right and withdraw one of the safeguards essential to a fair trial. *Nailor* v. *Williams*, 8 Wall. 107, 109; see *People* v. *Stevenson*, 103 Cal. App. 82; cf. *Brasfield* v. *United States*, 272 U. S. 448. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. *Nailor* v. *Williams, supra*." 282 U. S. 687, 692.

Although stressing the fact that cross-examination is exploratory and that defense counsel need not generally indicate his purpose in pursuing any particular line of inquiry, the Supreme Court pointed out that defense counsel was entitled to show, for example, the possible bias of a prosecution witness which might stem from a hope of leniency in his mind. 282 U. S. 687, 693. When a trial court commits error in curtailing a line of cross-examination, it is obviously impossible to say what such a line of questioning would have elicited. That is why the Supreme Court held that when a trial court cuts off *in limine* inquiry concerning a subject which defense counsel is entitled to pursue, this is in itself an abuse of discretion and necessarily a prejudicial error. It need not be demonstrated that the inquiry would have shattered the witness or even have made an impact upon him.

In the present case, the witness, Ohrynowicz, was asked if at the time of his arrest he was being pursued by the police (R. 562). An objection by the prosecutor was sustained, although this question was manifestly preliminary and the desire of counsel to explore the relationship of this witness to the police, the F.B.I. and prosecuting authorities was stated on the record by petitioner's counsel (R. 562). Obviously such relationships and the pressures put upon him or the promises made to him could have serious impact upon the mind of the witness giving testimony for the prosecution.

Ohrynowicz acknowledged on cross-examination that a charge of breaking and entering with intent to steal was filed against him by prosecuting authorities in Essex County, New Jersey, following his arrest on October 1, 1960 (R. 566). But when petitioner's counsel asked him if he was guilty of those charges, the court again volunteered an erroneous instruction that Ohrynowicz had a right to refuse to answer such a question (R. 567). Naturally, Ohrynowicz claimed the benefit of that non-existent right and did not answer. In view of the trial court's repeated, erroneous interpretation of the Fifth Amendment, petitioner's counsel was granted a continuing exception instead of attempting to pursue this line of inquiry fruitlessly (R. 569).

Another question put to Ohrynowicz by petitioner's counsel asked whether he had committed other burglaries prior to October 1, 1960 (R. 569). At this point, the trial court sustained an objection by the prosecutor without any preliminary discussion and without any indication by the witness that he would decline to answer. Manifestly, this was an improper limitation of cross-examination. *United States* v. *Masino*, 275 F. 2d 129 (2nd Cir. 1960).

Another defendant's counsel asked Ohrynowicz if he had committed any burglaries between 1954 and 1960 (R. 660). Once again, Ohrynowicz relied on the supposed privilege extended to him by the trial judge and declined to answer. A motion for a mistrial by counsel for Cardillo on the ground that the defense was being denied a fair opportunity to cross-examine Ohrynowicz by reason of the judge's improper ruling, was denied (R. 660).

It is clear that if Ohrynowicz were guilty of other state crimes, aside from the one admitted in his direct examination, and subject to the action of other prosecuting authorities, this would furnish him with a strong motive to falsify

his testimony in this case to assist in convicting others and winning possible leniency in other forums. Ohrynowicz could reasonably have expected that the U. S. Attorney's office and/or the F.B.I. would intercede for him with other public authorities or at least point out to them his invaluable assistance in securing convictions in the federal court. This would probably have diminished or even eliminated the possibility of prosecution of Ohrynowicz by state authorities. It must be remembered that such a motive for falsification can spring from a variety of facts. Defense counsel is absolutely entitled to pursue prior criminal activity of a witness to show such motivation. *U. S.* v. *Masino, supra*, and *infra*.

When petitioner's counsel attempted to inquire on cross-examination into some of the details of Ohrynowicz's first conversation with agents of the F.B.I., he was again stopped as the Court sustained a prosecution objection (R. 576-577). At that point, the specific question pertained to the subject of any possible discussion between the F.B.I. agents and Ohrynowicz concerning his right to counsel. Certainly the beliefs, fears and hopes that a man entertains concerning his personal rights when he is questioned by investigating agents are bound to influence his attitude then, and are likely to have an impact upon his later role as a witness, if he becomes one. Judge Murphy expressed the view that even if a prosecution witness had been beaten into confessing and later testified as a result of that beating against others, their counsel would have no remedy. This seems an astounding point of view because of the obvious way in which such pressure could affect a witness's propensity to falsify. Perhaps because Judge Murphy held this view he sustained this objection (R. 577). Surely if a witness entertains any bias, fear, hope of reward, hatred, or the like, these subjects are all within the legitimate scope of cross-examination to expose his possible motive to falsify.

The trial judge erred again in denying petitioner's counsel another opportunity to test the motives of the witness Ohrynowicz.

The motives of Ohrynowicz to testify falsely should have been explored most thoroughly on cross-examination, not only because he was a self-declared accomplice of most of the defendants, and a thrice-convicted criminal, but also because he had indicated very strongly that he was a person whose potential for cooperation was influenced by his hope of reward. When Ohrynowicz was questioned by the F.B.I. while still a state prisoner, he told the agents, " * * * he does not want to spend any time in jail and inquired as to whether or not he would be sent to jail if he cooperated fully" (R. 583).

On cross-examination, Ohrynowicz flatly denied that he had told the F.B.I. that he wanted to cooperate so that he would not have to spend any time in jail (R. 581).

Another indication of the importance of this witness's desire to save himself at the expense of others may be found in the circumstances surrounding his sentencing on June 7, 1961 before the same judge who tried this case. At that time, Ohrynowicz' counsel asserted on his behalf that he " * * * was willing and ready to admit his own guilt but was not desirous of involving anybody else * * *" (R. 1828), and, his lawyer added, Ohrynowicz, " * * * has steadfastly maintained the position that he will admit his own guilt but he will not attempt to involve anyone else and thereby possibly save himself a sentence or lessen a sentence that would be imposed" (R. 1830). At that time, the prosecutor told the sentencing judge, " * * * I spoke to the defendant [Ohrynowicz] for a moment or two back here in the cell block, and he told me that cooperation was just out of the picture and he was insistent on pleading guilty and being sentenced" (R. 1834).

Just two days after his sentencing to prison terms totaling ten years, Ohrynowicz was before the federal grand jury saying: "'This is why I am in here talking. He [my lawyer] told me that if you take a plea with this judge you are not going to get any more than three years'" (R. 667). At trial, Ohrynowicz denied that anyone had made any promise to him regarding his possible sentence (R. 613).

The great value of cross-examination, or even the introduction of collateral evidence to test the bias of a witness or his motive for falsification has long been recognized. See *Gordon* v. *United States*, 344 U. S. 414 (1953). The Supreme Court reversed the conviction on two grounds in *Gordon*, one being the trial court's prevention of the introduction of evidence concerning his urging of a defendant who then became a prosecution witness to tell all that he knew.

In *United States* v. *Lester*, 248 F. 2d 329 (2nd Cir. 1957), the sole ground for the reversal of a conviction by this Court was that the trial judge had not permitted defense counsel to elicit testimony on cross-examination tending to establish a motive to falsify on the part of the principal prosecution witness. A trial court's ruling that a prosecution witness who had testified concerning bribes paid to the defendant could rely on his privilege against self-incrimination to decline to disclose the names of others whom he had bribed was held to be an improper restriction of the right of cross-examination. *Montgomery* v. *United States*, 203 F. 2d 887, 891 (5th Cir. 1953).

In the case at bar, of course, Judge Murphy never advised Ohrynowicz when he was giving testimony on direct examination for the prosecution about a burglary he perpetrated in New Jersey and as to which charges were still pending against him (R. 566-567), that he had any supposed privilege against self-incrimination because he might

be convicted in the state court on his own testimony. It seems remarkable, therefore, that the judge volunteered such an instruction only when Ohrynowicz began to be questioned about possible state violations in the course of cross-examination.

Cross-examination in criminal cases in the federal courts is properly allowed to be broad and far-ranging, particularly in the case of prosecution witnesses who are themselves criminals, so that the trial in effect can properly assess their testimony in the light of its motivation. *United States* v. *Masino*, 275 F. 2d 129 (2nd Cir., 1960); *Montgomery* v. *United States*, *supra*. In *Masino*, this Court stressed the impropriety of curtailing cross-examination of prosecution witnesses concerning their motives to falsify, saying, "When a witness in a criminal case is being questioned as to his possible motives for testifying falsely, wide latitude should be allowed on cross-examination. Cross-examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined." 275 F. 2d 129, 132. The principle that prior illegal acts which have not resulted in conviction may be the subject of cross-examination in criminal cases to disclose motive for falsifying was approved there. One of the substantial errors this Court found in reversing *Masino* was the trial court's refusal to permit cross-examination of a vital prosecution witness as to whether he had sold heroin on another day. Two counts of an indictment against him involving that occasion had been dismissed after he had pleaded guilty to a third count. In holding this kind of limitation of cross-examination concerning prior illegal activity improper, this Court said, "Indeed, where the principal witnesses appearing on behalf of the prosecution have a criminal record or have engaged in criminal practices and are accomplices to the crime charged,

it is essential to a fair trial that the court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit." 275 F. 2d 129, 133.

These cases illustrate the application of the principle that cross-examination is a matter of right of a defendant, not a matter of grace extended by a trial court. Cross-examination is often asserted to be the "surest test yet devised of the truthfulness of a witness' testimony, and its allowance is especially important in the case of a witness who is himself an admitted violator of the law." *Montgomery* v. *United States*, 203 F. 2d 887, 891. Because this petitioner was deprived of the proper use of this right of cross-examination of the witness whose testimony was essential to his conviction, he should be granted a reversal.

This is not a case where petitioner's counsel was engaging in a particularly vicious or discursive attack on Ohrynowicz, nor indeed did any other lawyer who examined him do this. Ohrynowicz had admitted to two prior convictions involving armed robbery and burglary and he had given testimony concerning his role in a third burglary in this case. Surely it was not improper for defense counsel to probe concerning his other criminal activities, particularly burglaries since they knew he had been arrested for at least one other burglary, on October 1, 1960. Cross-examination concerning prior criminal activity of a witness like Ohrynowicz is not based upon the fact that the admission of such activity in itself has impeaching value, but rather because such information is highly relevant in evaluating the motivation of such a person to give false testimony.

Cross-examination is necessarily exploratory, in large part, as the Supreme Court has recognized. *Alford* v. *United States*, 282 U. S. 687, 692 (1931). We cannot say precisely what would have happened if defense counsel had been allowed properly to explore the background and mo-

tivation of Ohrynowicz for testifying. But certainly, the restriction of cross-examination cannot be said to have been harmless error because no one can say certainly what would have turned up. Obviously the court below could not speculate about the operation of Judge Murphy's mind, and conclude that no matter what damaging admissions he heard from or about Ohrynowicz he would necessarily have accepted and believed his testimony.

It would have been very simple for the trial judge to have allowed the proper cross-examination of Ohrynowicz. Certainly in view of Ohrynowicz' criminal past, his explicit desire to avoid serving time in jail, and the fact that he was the only witness to supply the key evidence against Cardillo shows that this appellant was entitled to wide latitude in cross-examination. The improper ruling of the trial judge concerning the privilege against self-incrimination permitted the witness to curtail his own questioning and this, coupled with the improper sustaining of some of the prosecution's objections, improperly limited appellant's right of cross-examination and entitles him to a new trial. The Court below reiterated the eminently fair doctrine that in a criminal case every proper means of ascertaining the truth should be placed at the defendant's disposal. *U. S.* v. *Freeman*, 302 F. 2d 347 (2nd Cir. 1962). Certainly the appellant in the case at bar was deprived of the proper exercise of his right of cross-examination, one of the principal weapons for determining the truth and, therefore, his conviction should be reversed.

It is elementary that a defendant in a criminal trial is entitled to conduct an especially searching cross-examination of a prosecution witness who is a co-conspirator or accomplice. *Moyer* v. *United States*, 78 F. 2d 624 (C. C. A. 9, 1935); *Stanley* v. *United States*, 245 F. 2d 427 (C. A. 6, 1955).

Also, as is enunciated by *Wigmore, on Evidence* (3rd Ed.), § 1391, the testimony of a witness who refuses to submit to full cross-examination is subject to a motion to strike in a proper case. Accord: *United States* v. *McKeown*, 19 F. Supp. 639 (D. Ky. 1937); *Stephan* v. *United States*, 133 F. 2d 87 (C. C. A. 6), cert. den. 318 U. S. 781; cf. *Jansson* v. *Larsson*, 30 App. D. C. 203 (1907).

The defense in this trial did move to strike the testimony of Friedman on the grounds indicated, but the motions were denied (J. A. 74a-75a*).

Cf. also, *Summit Drilling Corp.* v. *C. I. R.*, 160 F. 2d 703, 706 (C. C. A. 10, 1947), recognizing the rule that a witness' refusal to testify concerning a privileged document constitutes a cutting-off of the right to cross-examination and is ground for a motion to strike the direct testimony.

It is submitted also that, by fair analogy, indeed by analogy *a fortiori*, the rule should be applied here to a non-defendant witness which is applied to defendant-witnesses themselves, to the effect that if the witness takes the stand his right to invoke the privilege as to present or prior self-incrimination is waived. Friedman here testified as a self confessed co-conspirator. Cf. *United States* v. *Gottfried*, 165 F. 2d 360, 367 (C. C. A. 2), cert. den. 333 U. S. 860, 883 (collecting the cases).

We submit that the language of the Court of Appeals in *United States* v. *Mahoney*, 262 F. 2d 535, 537 (C. A. 2, 1959), is applicable here *mutatis mutandis*:

> "* * * we must confess that the situation is one in which either alternative results in prejudice to one side or the other; and it is impossible, so far as we can see, to lay down any general rule that will cover all instances. In the case at bar * * * it seems to us

* Refers to pages of Margolis' Joint Appendix in Court below.

that the interest of the accused should prevail over that of the prosecution, and that the judgment should not stand, for the questions touched vital elements of the charge. * * * "

Circuit Judge Clark, although concurring in the result did reluctantly do so (App. pp. 37-38*). In the aforesaid separate concurring opinion, Judge Clark stressed that "it is this very evil which the Supreme Court has continually repudiated". Judge Clark wrote, in pertinent part, as follows (App. pp. 37-38):

"We seem generally unwilling to upset convictions when the Jencks Act, 18 U. S. C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing * * * By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very *evil* which the Supreme Court has continually repudiated. See *Scales* v. *United States*, 367 U. S. 203, 258; *Palermo* v. *United States*, 360 U. S. 343, 346; *Jencks* v. *United States*, 353 U. S. 657, 668-669. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and *correction must come from the Supreme Court*. Thus I reluctantly concur in the affirmances here noted."

Certiorari should be granted to forever remove the *evil* mentioned above.

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* Refers to pages of Cardillo Appendix.

POINT II

This Court should settle the rule whether certain reports were improperly withheld from petitioner.

At the time of the testimony of Ohrynowicz and some other witnesses certain F.B.I. reports were submitted by the prosecutor to the trial court on the ground that they were not statements to which the defense counsel were entitled under Section 3500, Title 18, U. S. C. The trial court, after reading these reports, concurred with the prosecutor and ordered these documents sealed as court exhibits (see e.g., R. 648, Court Exhibit 14).

Since defense counsel were given no opportunity to examine these reports or to know any of their contents or anything about the manner of their preparation, appellant has no way of knowing whether their withholding was proper or not. If there was any question as to whether these reports fell within the definition of "statements" provided in Section 3500(e), then the trial court had a duty to conduct an inquiry into the facts and circumstances surrounding their preparation. *Campbell* v. *U. S.*, 365 U. S. 107 (1961); *U. S.* v. *McKeever*, 271 F. 2d 669 (2nd Cir., 1959).

Unfortunately, this placed the burden upon the Court below and requires this Court to determine the propriety of the trial court's action in withholding these documents from defense counsel, since we cannot tell what their contents are or what bearing they had, if any, upon the testimony of the witnesses involved.

From all of the foregoing it appears that the Court below was either unaware of or overlooked the controlling case law of the Second Circuit as hereinabove enunciated. Moreover, since the foregoing decisions of the several states are

in conflict with one another, it is incumbent upon this Court to resolve this conflict to create a consistent rule or yardstick. The case at bar is deemed so important and epitomizes the myriad problems which beset the field of "due process" deprivations. This Court should precisely set forth the basis upon which the Federal tribunals predicate their interpretation of the Jencks' Act; 18 U. S. C. §3500 so that a judge and/or prosecutor may not employ one or more of these doctrinal devices, referred to herein (App. p. 38), which would unjustly enable an appellate Court to affirm an appealed conviction. Therefore, this Court should assume jurisdiction and grant the writ of certiorari.

CONCLUSION

The petition for certiorari should be granted for the reasons relied on hereinbefore.

Respectfully submitted,

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Dated: June 20, 1963.